

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA (OS) No. 29/2007

Reserved on : May 9, 2007

Pronounced on : May 11, 2007

United India Insurance Co. Ltd.

.....Appellant

! through : Mr. P.K. Seth, Advocate

VERSUS

\$ Gian Singh & Anr.

.....Respondents

! through : Mr. B.K. Sood with
Mr. Ashok Popli, Advocates

CORAM :-

* THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MS. JUSTICE HIMA KOHLI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

1. We may note the factual matrix first as there is hardly any dispute insofar as the following facts are concerned :-
2. United India Insurance Company Ltd., the appellant herein, was a tenant under the respondents in respect of the first floor property bearing No. 38, Community Centre, Vasant Lok, Vasant Vihar, New Delhi. Lease commenced on 7.2.1986 though lease deed dated 5.8.1986 was executed between the parties, which was duly registered. Monthly rent was fixed at Rs.27,402/-. Period of lease agreed to between the parties was three years with option to the appellant to renew the lease for a further period of two years, subject to increase in

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rent by 15% on the last paid rent. No fresh lease deed was executed after the expiry of the lease period. However, the appellant was allowed to continue in the tenanted premises even after the expiry of this period. The appellant, thus, became tenant by holding over. Vide notice dated 13.2.1996 under Section 106 of the Transfer of Property Act, 1882, the respondents terminated the lease by the end of tenancy month i.e. 6.3.1996. The respondents also made a demand upon the appellant to vacate the premises on the expiry of the notice period, failing which, the appellant was notified that it would be liable to pay a sum of Rs.1,25,000/- p.m. as damages for use and occupation of the premises with effect from 7.3.1996. The appellant did not vacate the premises. The respondents, therefore, filed Suit No. 903/1997 for possession against the appellant in December 1997. The relief for damages or mesne profits, however, was not claimed and only decree of possession was prayed for reserving right to claim the damages by filing a separate suit. This suit was decreed vide judgment and decree dated 2.6.1999. The appellant preferred RFA No. 534/1999 in this Court. The appellant, however, agreed to vacate the premises by 30.6.2000 and an undertaking was given in this behalf and, therefore, the appeal was disposed of vide order dated 8.5.2000 in terms of the said settlement.

3. As the mesne profits were not claimed in the earlier suit filed and rights reserved, the respondent filed Suit No. 2213/1999 in this Court for recovery of Rs.40,40,557/- as damages for use and occupation of the premises. The suit was filed on 5.9.1999 and, therefore, the damages were sought for the period of three years i.e. from 6.9.1996 to 5.9.1999

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@ Rs.1,25,000/- p.m. Interest of 15% p.a. was also claimed. The appellant contested the suit by taking various defences. One plea was that it is barred under Order II Rule 2 of the Code of Civil Procedure, 1908 (for short, 'CPC'). It was also contended that mesne profits claimed were quite excessive and not payable. Evidence was led and the suit has culminated into judgment dated 1.11.2006 passed by a learned Single Judge of this Court. Objection of the appellant, on the basis of Order II Rule 2 CPC, is rejected holding that claim of damages would constitute a separate cause of action. The learned Single Judge has awarded the mesne profits @ Rs.40/- per sq.ft., i.e. Rs.65,520/- p.m. As the amount calculated @ contractual rent, i.e. Rs.2740/- p.m. had been paid, the appellant was held entitled to deduct the same and, therefore, net amount payable comes to Rs.38,118/- p.m. On this amount, interest @ 10% p.a. is also awarded with proportionate costs.

4. The mesne profits are awarded for the period from 6.9.1996 till 22.7.2000. Challenging this judgment and decree, the present appeal is filed.
5. Learned counsel for the appellant has not reagitated the argument on Order II Rule 2 CPC though this is one of the grounds taken in the appeal. It was but natural on the part of learned counsel for the appellant not to argue this issue as it was not pressed before the learned Single Judge itself, as is clear from the judgment.
6. The judgment and decree is challenged primarily on the following two grounds :-

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(a) The suit was for damages/mesne profits simplicitor for specific period, namely, 6.9.1996 to 5.9.1999. The suit was filed on 25.9.1999. Therefore, the award of damages for the period 6.9.1996 to 24.9.1999 was beyond the period of limitation and, therefore, time barred. Further, as there was no prayer for the grant of mesne profits for the period beyond 6.9.1999, awarding the damages for the period from 6.9.1999 to 22.7.2000 was beyond the scope of prayer and could not have been awarded.

This submission appears to be correct and learned counsel for the respondents unhesitatingly conceded that the decree be confined for the period from 6.9.1996 to 5.9.1999.

The bone of contention was really the second submission whereby the rate of Rs.40/- per sq.ft. fixed by the learned Single Judge is questioned. Learned counsel for the appellant referred to the following reasons given to arrive at this figure :-

"28. Excluding Ex.PW-1/8 for the reason the lease is for a commercial purpose for a ground floor flat, I determine the rentals in the area in the context of Ex.DW-1/3 and statement of DW-1 pertaining to second floor flat in property No.46, Vasant Lok, Vasant Vihar, New Delhi. In June 1993, rent was Rs.21.275 per square feet. In March 2000, for a fully air conditioned flat, the rent was Rs.70/- per sq.feet. Giving a discount of Rs.20/- per sq. feet, it would be safe to assume that the rental in area for non air-conditioned flats on the second floor were Rs.50/- per sq.feet in the year 2000.

29. Damages have to be computed with effect from 6.9.1996 till 22.7.2000. In view of the rent evidenced by Ex.DW-1/3 and the discounted rent as noted above for property No.46, Vasant Lok, Vasant Vihar, New Delhi, it would be safe to assume that the rent in the year 1996 would be Rs.30/- per sq.feet. I accordingly take the mean average rent at Rs.40/- per sq.feet per month."

His submission was that the very basis for taking the mesne average goes when the decree is not to include the year 2000. He submitted that since the learned Single Judge had computed the

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damages from 6.9.1996 to 22.7.2000, he took into consideration the rent at which the appellant took the premises, after vacating the premises of the respondents, namely, Rs.50/- per sq.ft. However, the year 2000 would cease to have any relevancy when the mesne profits are restricted upto 5.9.1999 and do not spill over to the year 2000. This submission appears to be attractive in the first blush. However, we note that there is sufficient evidence on record to sustain this finding, nevertheless.

Ex.PW-1/8 was a lease pertaining to ground floor of property No.5, Community Centre, Vasant Lok, Vasant Vihar, New Delhi. The suit property is on plot No.38, Community Centre, Vasant Lok, Vasant Vihar, New Delhi. Not only the two are commercial properties, they are also in the same area. The only difference is that Ex.PW-1/8 was a lease pertaining to the ground floor whereas the suit premises are on the first floor. Further, area under Ex.PW-1/8 was 727 sq.ft. whereas the area of the suit flat is 1638 sq.ft. However, the rental, as per this Exhibit, is Rs.202.32 per sq.ft. Even if the rental is to be sufficiently reduced, having regard to the aforesaid differences, by no stretch of imagination it could be said that the suit premises would have fetched less than Rs.40/- per sq.ft. for the relevant period.

(b) Ex.DW-1/3 is the lease of the comparable premises, as per which the rent was Rs.21.27 per sq.ft. This lease is dated 7.6.1993. We are concerned with the period from 1996-1999. We may refer to the judgment of the Division Bench of this Court in *National Radio & Electronic Co. Ltd. v. Motion Pictures Association*, 2005 (123) DLT

629. It is a matter of common knowledge that from 1993 to the relevant period, the rentals are at an increasing trend.

(c) It has come on record in the form of statement of the appellant's own witness that the appellant had taken premises on rent in March 2000 at a monthly rent of Rs.70/- per sq.ft. Since these premises were fully air-conditioned, the learned Single Judge gave a discount of Rs.20/- per sq.ft. and, therefore, opined that it would be safe to assume that rental for the area for non air-conditioned flats on second floor were Rs.50/- per sq.ft. in March 2000. The suit premises are on the first floor. The rental of the first floor would be higher than the rental on the second floor, at least be marginally higher. If the appellant itself had taken the premises on rent at that rate in March 2000, which is hardly six months away from the period upto which mesne profits are claimed by the respondent, fixing of rental of Rs.40/- per sq.ft. would be quite reasonable applying this yardstick. We are, therefore, of the opinion that there is sufficient evidence on record to justify the finding of the learned Single Judge fixing the mesne profits at Rs.40/- per sq.ft. for the period in question.

We may take note of one last submission made by learned counsel for the appellant. It was sought to be argued that no interest should have been awarded as the respondents did not approach the Court earlier and claimed damages/mesne profits along with the prayer for possession in Suit No. 903/1997 and approached the Court belatedly by means of the second suit and, therefore, they should not be awarded any damages. The argument is noted only to be rejected. The hollowness of this submission would be clear from the following :-

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(i) the respondents had given notice to quit under Section 106 of the Transfer of Property Act, 1882 requiring the appellant to vacate the premises on the expiry of notice period on 6.3.1996. It was threatened that if premises are not vacated and the appellant continues, it will have to pay damages @ Rs.1,25,000/- p.m. The appellant chose to ignore this notice and took the risk of staying in the premises even after the termination of the tenancy. It is held that the lease was validly terminated and the appellant was in wrongful possession and, therefore, decree for possession was passed;

(ii) even in the Suit No. 903/1997, the respondents had cautioned the appellant by specifically mentioning that they would be demanding damages for use and occupation of the premises @ Rs.1,25,000/- p.m.;

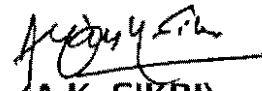
(iii) the respondents had right to claim the damages for the period which is covered by the law of limitation. In Suit No. 2213/1999 filed ultimately for claiming damages, the period is restricted to three years and no damages are awarded beyond three years period. Once it is recognised that the respondents had right to recover the damages for the period in question, they will have the right to claim interest as well over the amount awarded.

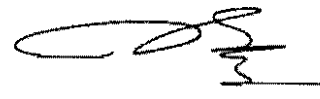
7. We say so because of the reason that interest is otherwise payable on the damages/mesne profits so awarded. Such a right cannot be denied only because the respondents did not file the suit in the first instance. The appellant has, in any case, become a beneficiary, inasmuch as for the period from 6.3.1996 to 24.9.1996, no such damages could be awarded or claimed as it was beyond limitation. Likewise, the respondents have not been able to get the damages at the rate fixed

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for the period from 6.9.1999 to 22.7.2000 as they failed to file any subsequent suit covering this period.

8. The appeal is, therefore, partially allowed. We modify the decree to the extent that it would not cover the period from 6.9.1996 till 24.9.1996 and from 6.9.1999 to 22.7.2000. Rest of the decree stands.
9. Decree, as modified, shall be drawn by the Registry. No costs.


(A.K. SIKRI)
JUDGE


(HIMA KOHLI)
JUDGE

May 11, 2007
nsk